Nos. 88-1031 and 88-1260

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITIBANK, N.A.,

Petitioner,

v.

NGOC QUANG TRINH,

Respondent.

CITIBANK, N.A.,

Petitioner,

v.

WELLS FARGO ASIA LIMITED,

Respondent.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Sixth and Second Circuits

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PETITIONER'S SUPPLEMENTAL BRIEF PURSUANT TO RULE 22.6 IN RESPONSE TO THE SOLICITOR GENERAL'S BRIEFS FOR THE UNITED STATES

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Pursuant to Rule 22.6 of the Rules of this Court, petitioner Citibank, N.A. ("Citibank") files this brief in response to the Solicitor General's *amicus curiae* briefs for the government in these cases.

In its petitions, Citibank asked this Court to grant certiorari in both *Wells Fargo* and *Trinh* to correct a

fundamental error of substantial importance to the U.S. banking system and the body of federal regulations on which that system is based. In response to the Court's invitation, the Solicitor General has joined Citibank in urging that the Court grant certiorari in *Wells Fargo*, although he would prefer that the Court limit its grant to the second of the two questions Citibank has presented. With respect to *Trinh*, the Solicitor General recommends that the Court either grant Citibank's petition and consider the case together with *Wells Fargo* or hold the case until *Wells Fargo* has been decided.

Although Citibank agrees with much of what the Solicitor General says in both *Wells Fargo* and *Trinh*, Citibank believes that the preferred course would be for the Court to grant certiorari as to both of the questions presented in Wells Fargo and to grant certiorari in *Trinh* and consolidate it with *Wells Fargo* for purposes of oral argument. This approach will preserve the Court's prerogative to dispose of the cases on the ground that it concludes to be most appropriate after full briefing and oral argument.

The Solicitor General and Citibank begin from a common starting point. Federal regulation of foreign operations of U.S. banks has long been premised on the fundamental distinction between deposits payable in the United States and those payable only abroad.[1] Indeed, the Federal Reserve Board by regulation (subsequently codified by Congress) has expressly provided that a "customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes whatever risk may exist that the foreign country in which a branch

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[1] *See* Brief for the United States as Amicus Curiae, *Citibank, N.A. v. Wells Fargo Asia Ltd.*, No. 88-1260, at 18 (filed Nov. 2, 1989) [hereinafter "U.S. *Wells Fargo* Brief"]; Brief for the United States as Amicus Curiae, *Citibank, N.A. v. Trinh*, No. 1031, at 10 n.6 (filed Nov. 2, 1989) [hereinafter "U.S. *Trinh* Brief"].

is located might impose restrictions on withdrawals." [2] The Solicitor General recognizes that any other allocation of sovereign risk would raise serious federal concerns.[3] Thus, the Solicitor General finds that the federal interest involved in these cases is substantial and furthermore unequivocally concludes that the decisions of the courts of appeals in both cases are clearly wrong and harmful.

The Solicitor General believes that there are two alternative ways of dealing with the problems he identifies in *Wells Fargo* and *Trinh*. He agrees that one approach would be that urged by Citibank: articulation of a uniform federal rule specifying when U.S. banks are liable for deposits made with their foreign branches. In the alternative, the Solicitor General contends that proper application of "general banking law principles," grounded in state and foreign law, should be adequate to safeguard the important federal interests at stake in *Wells Fargo* and *Trinh*. The Solicitor General would have this Court correct the lower courts' misapprehension of these general banking law principles pursuant to 12 U.S.C. § 632 (1988), under which suits against national banks "arising out of transactions involving international or foreign banking" are "deemed to arise under the laws of the

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[2] 12 C.F.R. § 204.128(c) (1989).

[3] U.S. *Wells Fargo* Brief at 18 ("The federal banking agencies have long premised their regulations on an understanding that a depositor who opens a foreign branch account assumes the risk that the foreign government may restrict his right to repayment. Citibank is correct that a contrary understanding would create a serious tension with federal reserve and deposit insurance requirements."); U.S. *Trinh* Brief at 10 n.6 ("the court's suggestion that the deposit agreement 'must clearly and unmistakably inform depositors that they have no right to proceed against the home office' (Pet. App. 12a) is inconsistent with the general understanding, reflected in the Federal Reserve Board's regulations, that a United States bank's home office is not liable for foreign sovereign interference with a foreign branch's failure to repay a deposit unless the home office expressly undertakes that liability").

United States." There is a fine distinction between federal courts' articulating uniform "general banking law principles" applicable to international banking actions "deemed to arise under" federal law, on the one hand, and based on federal statutes and regulations applicable to international banking, on the other.

Citibank submits that it would be premature for the Court to decide at this point the grounds that it will rely upon in ultimately ruling in *Wells Fargo* or *Trinh*. It may be that, after full briefing and oral argument, the Court will agree with the Solicitor General and reserve the question of federal substantive law for decision in another case, having concluded that there is some narrower ground on which federal interests can be protected in these cases. On the other hand, the Court may conclude that such a narrower ground is not available here, or that, even if available, it is preferable to articulate a federal rule of decision in this case so as to bring greater certainty to what the Solicitor General himself believes to be an uncertain and troublesome area. U.S. *Trinh* Brief at 16. Accordingly, we believe the better course would be for the Court to grant certiorari as to both questions presented in the *Wells Fargo* petition, preserving its ability to rule on either of the two grounds identified by the Solicitor General.

With respect to *Trinh*, the Solicitor General suggests that, if the Court grants certiorari in *Wells Fargo*,

> it may wish to grant this petition as well and consolidate the cases for review. That procedure would allow the Court to examine a broader range of issues —and to correct the potentially troublesome decision in this case—with minimal additional expenditure of its limited resources.

U.S. *Trinh* Brief at 17. In the alternative, the Solicitor General recommends that the Court hold *Trinh* for consideration in light of the Court's ultimate decision in *Wells Fargo*.

Citibank submits that the first of the options offered by the Solicitor General is more efficient and preferable. First, consolidating the two cases will give the Court the opportunity, as the Solicitor General observes, "to examine a broader range of issues." U.S. *Trinh* Brief at 17. *Trinh* presents the same basic problem as *Wells Fargo*, but in a very different factual context and with very different immediate ramifications. Where *Wells Fargo* involves an oral deposit agreement between two sophisticated banks with respect to the off-shore deposits of dollars, *Trinh* involves a passbook savings account of local currency (Vietnamese piasters) deposited by a foreign individual. In addition, *Trinh* raises substantial questions of U.S. foreign relations policy that are better presented in that case than they are in *Wells Fargo*. Such issues include U.S. policy toward U.S. businesses evacuating foreign countries in times of revolution and armed conflict and U.S. participation in claims settlement arrangements growing out of foreign government expropriations. The Court therefore has the rare opportunity to grant certiorari in two cases that together present a relatively comprehensive view of an important federal problem, thereby leading to resolution of many of the issues at one time.

Second, U.S. banks remain at substantial risk from the possibility of foreign civil and political unrest and it is therefore of utmost importance that doctrines such as those relied upon by the court of appeals in *Trinh*—doctrines that the Solicitor General urges are fundamentally mistaken—be put to rest. The small amount of the claim immediately at stake in *Trinh* and the fact that future cases from Vietnam are unlikely in no way limits the extent of the risk posed for the U.S. banking system. Foreign branches of Citibank alone hold hundreds of millions of dollars worth of local currency deposits similar to that involved in *Trinh*, and these branches are often in politically unstable nations; such deposits are now at risk under the court of appeals ruling in *Trinh*. Nor does the

fact that there may not be many Vietnamese cases in the future indicate that *Trinh* is not an important case in its own right. As the Solicitor General agrees, "there is a substantial possibility that American courts may mistakenly apply [*Trinh* and *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982)] as precedent in interpreting other deposit agreements, other foreign substantive law, and other foreign governmental actions." U.S. *Trinh* Brief at 16. Indeed, the Solicitor General recognizes that both the Sixth Circuit below and the Second Circuit in *Vishipco* purported to apply " 'general banking law principle[s]' that are customarily followed worldwide." U.S. *Trinh* Brief at 8. Given that the erroneous decision in *Vishipco* is now "no longer an isolated aberration" (U.S. *Trinh* Brief at 9), and given the need of bank regulators and banks alike to plan for risk in advance of actual crises, it is important that the Court at this stake reserve its prerogative to address directly the issues posed by *Trinh*.

CONCLUSION

In both *Wells Fargo* and *Trinh*, the lower courts have committed errors that raise substantial questions of federal law and policy. In both there are alternative means potentially available for remedying the problem. One alternative is for the Court to articulate a uniform federal rule of bank liability with respect to foreign branch deposits, as urged by Citibank; another route to the same end may be, as the Solicitor General suggests, to correct the mistakes of the lower courts by invoking "general banking law principles" that are "deemed to arise" under federal law by virtue of congressional statute. Given the admitted importance of the federal interests involved, the clear errors of the lower courts, and the opportunity to review this important issue in quite different factual contexts "with minimal additional expenditure of [judicial]

resources" (U.S. *Trinh* Brief at 17), the Court should grant certiorari in both cases and consolidate them for purposes of oral argument.

Respectfully submitted,

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